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No. 95-1268

In The

Supreme Court of the United States

October Term, 1995

STATE OF MARYLAND,

Petitioner,

v.

JERRY LEE WILSON,

Respondent.

On Writ Of Certiorari To The
Court Of Special Appeals Of Maryland

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

When a police officer makes a lawful traffic stop, does the officer's automatic right to order the driver to exit the vehicle, pursuant to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), extend to passengers in the stopped vehicle?

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A. Judge Moylan, a nationally recognized Fourth Amendment scholar, correctly analyzed this Court's decisions in *Mimms*, *Rakas*, and *Long*. He correctly ruled that this Court has never permitted the police to automatically require a passenger to exit a vehicle, merely because the passenger is in a vehicle that has been lawfully stopped for a traffic violation 3

1. In *Mimms*, this Court addressed the de minimis additional intrusion of requiring the driver to exit a lawfully stopped vehicle, but the Court did not address passengers 5

2. In *Rakas*, this Court addressed the standing of a passenger to challenge a vehicle search, but the Court did not address the seizure of passengers, much less whether *Mimms* extends to passengers. Therefore, the substitution of the word "passengers" for the word "drivers," in a footnote in the concurrence, when referring to *Mimms*, is legally insignificant ... 7

3. In *Long*, this Court addressed whether a valid frisk, based on reasonable suspicion of threat to officer safety, permits a search of the vehicle, but the Court did not address whether *Mimms* extends to passengers. Therefore, the Court's substitution of the word "persons" for the word "drivers," when referring to *Mimms*, is legally insignificant.. 9

4. In properly analyzing and applying this Court's precedents, Judge Moylan carefully and thoroughly explained (1) just how narrow the *Mimms* holding is, and was intended to be, and (2) that *Mimms*, *Rakas*, and *Long* are as distinguishable from the case at bar as they are from each other 10

B. It is unreasonable, under Fourth Amendment jurisprudence, for the police to have the per se power, as to all passengers, in all vehicles,

under all circumstances, to demand that the passenger exit the vehicle, when there is no reasonable suspicion of passenger wrongdoing and no threat to officer safety, and the passenger is merely present when the driver violates a traffic regulation 13

1. **The seizure of persons requires reasonable suspicion of some wrongdoing, based on specific articulable facts, applying an objective standard. As such, the Fourth Amendment does not permit an automatic right to seize any passenger, when there is no reasonable suspicion as to that passenger. To make such a rule would extend unfettered discretion to the police and insulate their conduct from judicial review** 14

2. **Passengers, like all persons, maintain a high reasonable expectation of privacy in their personal integrity, which is not waived merely by becoming a passenger. Although passengers anticipate a brief delay in their journey if the driver violates a traffic regulation, they should not be subjected to a seizure of their person merely by their presence in the vehicle, absent any wrongdoing on their part** 18

3. **A mere incremental additional intrusion upon a driver, who has already been lawfully intruded upon, is de minimis. However, when the police demand that a passenger exit the vehicle, despite a lack of any reasonable suspicion of wrongdoing by the passenger, such an intrusion upon the passenger's Fourth Amendment rights is not de minimis and is unconstitutional.** 22

4. **The State's reliance on *Summers* and *Acton* is misplaced. The additional intrusion in *Summers* was permitted primarily because of the underlying judicial determination of probable cause, in the context of a validly executed warrant. The intrusion in *Acton* was permitted solely because it applied equally to all public school athletes and was not subject to the unfettered discretion of a particular governmental official** 27

C. **If this Court were to extend *Mimms* to passengers, much of the reasonableness analysis, slowly and carefully evolved by this Court since *Terry*, would be overruled** 31

1. **To permit the police, under a per se rule, to remove any passenger, at any time, from any vehicle, based solely on a traffic violation of the driver, without requiring any level of suspicion as to the passenger, would unconstitutionally extend unfettered discretion to the police and would unconstitutionally place the conduct of the police beyond judicial review** 32

2. **Even the important governmental interest in officer safety should not serve as the basis to**

retreat from the Fourth Amendment requirement of an objective standard of reasonableness, subject to judicial review, to which this Court has steadfastly adhered 36

3. Even if officer safety were sufficient justification for (1) overruling the requirement of reasonable suspicion, and (2) eliminating judicial review as a check on police discretion, extending *Mimms* to passengers will not accomplish the desired goal. There is no evidence to indicate that a rule providing unfettered discretion to the police will enhance officer safety 39

D. No Fourth Amendment issue could be less appropriate for the adoption of a bright-line rule than the issue now before this Court. The State's proposed rule would "draw the line" in such a way as to extend unfettered discretion to the police, and thus insulate police conduct from judicial review. Moreover, by applying a bright-line rule in the context of the most frequent of all citizen-police encounters, this Court would be deeming an almost limitless variety of situations to be constitutionally indistinguishable 41

E. Because Trooper Hughes was not constitutionally entitled to automatically require Wilson to exit the vehicle, the evidence seized was a fruit of the poisonous tree. Accordingly, the trial court correctly ruled

that the evidence must be suppressed, and the appellate court correctly affirmed the judgment of the trial court. 48

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IN THE
SUPREME COURT OF THE UNITED STATES
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No. 95-1268

STATE OF MARYLAND,
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JERRY LEE WILSON,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Respondent accepts the Statement of the Case as presented by the State, with the following exceptions:

The State, relying solely on the testimony the Trooper Hughes, claims that the trooper witnessed constant movement by the front and rear seat passengers, and that the passengers "*continuously* ducked below the seat level and then reappeared." Pet. Brief at 2 (emphasis added). However, the trial court, as fact finder on the suppression motion, found only that the two passengers "turned and

looked at the trooper four or five times, their heads went up and down four or five times, and they looked 'furtively.'" Pet. App. at 33a. The Honorable Charles E. Moylan, Jr., writing for a unanimous Court of Special Appeals of Maryland, concluded that Trooper Hughes noticed only that the passengers had on "several occasions" ducked below the seat. Pet. App. at 2a.

The State claims that "Hughes continued to see a lot of movement in the car, which made him hesitant to approach it." Pet. Brief at 2-3. However, neither the trial court, nor Judge Moylan, found that the trooper either: (1) witnessed a lot of movement in the vehicle after it pulled over, or (2) was hesitant to approach the vehicle after it pulled over. Pet. App. at 2a-3a, 33a-34a.

The State claims that Wilson exited the vehicle upon the trooper's request only "[a]fter initially refusing to comply with the [officer's request.]" Pet. Brief at 3. However, neither the trial court, nor Judge Moylan, found that Wilson ever initially refused to obey the trooper. Pet. App. at 2a-3a, 33a-34a.

ARGUMENT

WHEN A POLICE OFFICER MAKES A LAWFUL TRAFFIC STOP, THE AUTOMATIC RIGHT TO REQUIRE THE DRIVER TO EXIT THE VEHICLE CANNOT CONSTITUTIONALLY BE EXTENDED TO PASSENGERS, WHEN THERE IS NO REASONABLE SUSPICION THAT THE PASSENGER HAS COMMITTED ANY WRONGDOING OR POSES ANY THREAT TO OFFICER SAFETY, PARTICULARLY WHEN SUCH A RULE WOULD INSULATE POLICE CONDUCT -- AND MISCONDUCT -- FROM

JUDICIAL REVIEW.[1]

A. Judge Moylan, a nationally recognized Fourth Amendment scholar, correctly analyzed this Court's decisions in *Mimms*, *Rakas*, and *Long*. He correctly ruled that this Court has never permitted the police to automatically require a passenger to exit a vehicle, merely because the passenger is in a vehicle that has been lawfully stopped for a traffic violation.

The State argues that the opinion of Judge Moylan[2] is

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[1]A de novo review of whether the trooper had reasonable suspicion to order Wilson to exit the vehicle should not be conducted by this Court. Although this Court has held that an appellate court may conduct a de novo review of reasonable suspicion, the Court also stated that appellate courts "should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas v. United States*, 116 S. Ct. 1657, 1663 (1996). Additionally, the State petitioned both this Court and the Court of Appeals of Maryland "only [on] the issue [of] whether the officer had the automatic right to order Wilson out of the vehicle." Pet. Brief at 4 n.1.

[2]Judge Moylan's interpretation of the Fourth Amendment should not be taken lightly. He has served for 26 years on the Court of Special Appeals of Maryland. During that time, Judge Moylan has authored 103 published opinions resolving Fourth Amendment issues and has participated on a three-judge panel resolving Fourth Amendment issues, in a published opinion, on 274 occasions. Additionally, he authored the 147-page search and seizure section of Richard P. Gilbert & Charles E. Moylan, Jr., *Maryland Criminal Law: Practice and Procedure* (1983 & Supp. 1990). Of Judge Moylan's 12 books and articles, one other book and five law review

contrary to precedent of this Court. Pet. Brief at 6-8. The State is incorrect. In his opinion, Judge Moylan (1) correctly analyzed *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), *Rakas v. Illinois*, 439 U.S. 128 (1978), and *Michigan v. Long*, 463 U.S. 1032 (1983); (2) rectified a linguistic error of his own court in *Derricott v. State*, 84 Md. App. 192, 578 A.2d 791 (1990), *rev'd*, 327 Md. 582, 611 A.2d 592 (1992);[3] and (3) properly distinguished *Rakas* and

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articles analyze the Fourth Amendment, to include: *The Right of the People to be Secure: An Examination of the Fourth Amendment* (1976 & rev. 2d ed. 1979); *The Fourth Amendment Inapplicable vs. the Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1977 S. Ill. U.L.J. 75; *The Automobile Exception: What It Is and What It Is Not -- A Rationale in Search of a Clearer Label*, 27 Mercer L. Rev 987 (1976); *The Inventory Search of an Automobile: A Willing Suspension of Disbelief*, 6 U. Balt. L. Rev. 203 (1976); *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 Mercer L. Rev. 1047 (1975); *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 Mercer L. Rev. 741 (1974). He served for six years as the elected State's Attorney for Baltimore City, following five years as the Deputy State's Attorney and an Assistant State's Attorney. In 1968, Judge Moylan was named Outstanding Prosecutor for the nation by the National District Attorneys' Association. He is a former president of the Maryland State's Attorneys' Association and vice-president of the National District Attorneys' Association. Judge Moylan has served as an adjunct law professor at both the University of Maryland School of Law and the University of Baltimore School of Law. He has lectured to prosecutorial and judicial groups in all 50 states on Fourth Amendment issues.

[3] In *Derricott v. State*, 84 Md. App. 192, 578 A.2d 791 (1990), *rev'd*, 327 Md. 582, 611 A.2d. 592 (1992), the Court of Special Appeals of Maryland used the phrase "and/or any of the passengers" to describe persons that the police may require to exit

Long from *Mimms* and from the case at bar. Judge Moylan's opinion correctly explains that *Mimms*, *Rakas*, and *Long* are as distinguishable from the case at bar as they are from each other. Accordingly, neither *Rakas* nor *Long* should be read as interpreting *Mimms*. Judge Moylan's opinion demonstrates that the State incorrectly relies on dicta. To the contrary, his opinion strictly follows, and does not deviate from, this Court's precedents.

1. In *Mimms*, this Court addressed the de minimis additional intrusion of requiring the driver to exit a lawfully stopped vehicle, but the Court did not address passengers.

Mimms was driving with an expired license plate. *Id.* at 106. When the police stopped Mimms, an officer asked him to exit the vehicle and to produce appropriate documents. *Id.* In framing the issue, this Court stated:

> [W]e need presently deal only with the narrow question of *whether the order to get out of the car, issued* [to the driver] *after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment*,

Id. at 109 (emphasis added), even though the officer had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior. The Court's holding was also

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a lawfully stopped vehicle. Pet. App. at 14a-15a. In his decision, Judge Moylan refuted that proposition, explicitly stating that "[t]he overly broad inclusion of the phrase 'and/or any of the passengers' [in *Derricott*] was simply wrong. *Pennsylvania v. Mimms* did not stand for so broad a proposition." Pet. App. at 15a.

narrow, as follows:

> [W]e do not hold today that "whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car." *We hold only that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.*

Id. at 111 n.6 (emphasis added). The Court further noted:

> "[T]he reasonableness . . . of the particular governmental invasion of a citizen's personal security [requires a balance] between the public interest and the individual's right to personal security free from arbitrary interference by law enforcement officers."

Id. at 109. Thus, in *Mimms*, this Court balanced society's interest in officer safety with the driver's interest in personal liberty, occasioned not by the initial lawful stop, but by the subsequent order to exit the vehicle. The Court reasoned that because the officers had already lawfully decided that the driver be briefly detained, the additional intrusion could only be described as de minimis. *Id.* at 111.

Mimms was accompanied by a passenger. The State did not address the passenger, arguing only "that it [was] permissible to order the *driver* out of the car." *Id.* at 110 n.5 (emphasis added). Moreover, the Court, after acknowledging the existence of the passenger, by stating that "[t]he other occupant of the car was carrying a .32-caliber revolver," made no further mention of the passenger or of the Fourth Amendment rights of passengers. *Id.* at 107. Instead, the Court addressed only the additional intrusion of the already validly stopped driver.

The failure of the Court to even address the Fourth

Amendment rights of passengers only reinforces the understanding that *Mimms* (1) did not create an automatic right for the police to demand that passengers of lawfully stopped vehicles exit the vehicle, and (2) recognized that the Fourth Amendment interests of passengers and drivers in validly stopped vehicles are different.

2. In *Rakas*, this Court addressed the standing of a passenger to challenge a vehicle search, but the Court did not address the seizure of passengers, much less whether *Mimms* extends to passengers. Therefore, the substitution of the word "passengers" for the word "drivers," in a footnote in the concurrence, when referring to *Mimms*, is legally insignificant.

In *Rakas,* the police received a robbery call describing the vehicle. 439 U.S. at 130. Upon stopping the vehicle, the police required the four occupants to exit the vehicle. The interior of the vehicle was searched and weapons were seized. *Id.* Rakas was neither the owner, nor the driver, of the vehicle, and he did not assert a possessory interest in the evidence seized. *Id.* at 129.

Mimms and *Rakas* are so distinguishable that the analysis of one cannot possibly assist in the analysis of the other. *Rakas* cannot support a reading of *Mimms* beyond its narrow holding. First, the factual scenarios are different. *Mimms* involved a routine traffic stop, whereas *Rakas* involved a vehicle containing suspects of a robbery, an inherently dangerous felony. The police who stopped Mimms had no reason to suspect wrongdoing or that Mimms or his passenger posed any threat to officer safety. 434 U.S. at 109. The stop in *Rakas,* on the other hand, presented a robbery situation, in which weapons could reasonably be expected,

thus providing reasonable suspicion of a threat to officer safety.

Second, the legal issues are different. Mimms was a driver who challenged the "seizure" of his person. Conversely, Rakas was a passenger who challenged the "search" of the vehicle. Thus, in *Mimms*, this Court was presented with a Fourth Amendment compliance issue as to the seizure of a person, i.e., whether requiring a driver to exit a vehicle, following a valid traffic stop, was reasonable under the Fourth Amendment. The entire *Mimms* opinion concerned the merits of the constitutionality of the police action in requiring Mimms to exit the vehicle.

In *Rakas*, on the other hand, this Court was presented with a Fourth Amendment applicability issue as to the search of a vehicle, i.e., whether a passenger has standing to challenge evidence seized during a search of the vehicle, absent either a reasonable expectation of privacy in the area searched or a possessory interest in the automobile and/or the items seized.

Because "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted," Rakas lacked standing to challenge the seizure of the evidence. 439 U.S. at 133-34. Moreover, Rakas did not challenge the constitutionality of being required to exit the vehicle. Because Rakas's rights were not implicated, the Court never reached the merits of his Fourth Amendment challenge. As such, this Court had no occasion to conduct a reasonableness analysis in *Rakas*.

Notwithstanding the lack of relevance of *Mimms* in resolving *Rakas*, the *Rakas* concurrence stated: "[T]his Court determined in . . . *Mimms* that passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made." *Id.*

at 155 n.4 (Powell, J., joined by Rehnquist, J. (now C.J.), concurring). Thus, the *Rakas* concurrence, without discussion or subsequent citation to *Mimms*, sua sponte substituted, in a footnote, the word "passengers" for the word "drivers," even though passenger rights were not discussed by the Court in *Mimms*.

3. In *Long*, this Court addressed whether a valid frisk, based on reasonable suspicion of threat to officer safety, permits a search of the vehicle, but the Court did not address whether *Mimms* extends to passengers. Therefore, the Court's substitution of the word "persons" for the word "drivers," when referring to *Mimms*, is legally insignificant.

In *Long*, this Court granted certiorari "to consider the narrow issue of the authority of a police officer to protect himself by conducting a *Terry*-type search of the passenger compartment of a motor vehicle during the lawful investigatory stop of the occupant of the vehicle." *Id.* at 1037. Finding that the police had reasonable suspicion that Long posed a danger, the Court stated: "[P]rotection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger . . ." *Id.* at 1049.

Because Long had already voluntarily exited the vehicle when the police arrived, the Court did not have an occasion to address the constitutionality of requiring a driver or a passenger to exit a vehicle. Thus, the issue in *Long*, like the issue in *Rakas*, did not involve the *Mimms* issue.

Like *Mimms* and *Rakas*, *Mimms* and *Long* are so distinguishable that the analysis of one cannot possibly assist in the analysis of the other. Like *Rakas*, *Long* cannot support

a reading of *Mimms* beyond its narrow holding. First, the factual scenarios are different. *Mimms* involved a routine traffic stop, whereas, in *Long*, the officers had reasonable suspicion that Long posed a danger to officer safety. *Id.* at 1032. Second, the legal issues are different. Because Long voluntarily exited his vehicle, he did not allege that he was seized unconstitutionally. Instead, he challenged only the search of the vehicle and subsequent seizure of his property. Thus, the *Long* Court did not have before it the *Mimms* issue, much less the applicability of the *Mimms* holding to passengers.

In *Long*, this Court misstated its narrow *Mimms* holding, as follows:

> In . . . *Mimms*, we held that police may order *persons* out of an automobile during a stop for a traffic violation, and may frisk those *persons* for weapons if there is a reasonable belief that they are armed and dangerous.

463 U.S. at 1047-48 (emphasis added). The Court, without discussion or subsequent citation to *Mimms*, sua sponte substituted the word "persons" for the word "drivers," even though only driver rights were discussed in *Mimms*.

4. In properly analyzing and applying this Court's precedents, Judge Moylan carefully and thoroughly explained (1) just how narrow the *Mimms* holding was intended to be, and (2) that *Mimms*, *Rakas*, and *Long* are as distinguishable from the case at bar as they are from each other.

Judge Moylan cautioned against "extract[ing] too much meaning from . . . *Mimms*," correctly stating:

> The simple holding of . . . *Mimms* is that whenever a police officer stops a vehicle for a traffic violation, even of the most minor variety, it is reasonable for the officer to order the *driver* to alight from the vehicle . . .
>
> . . .
>
> The [*Mimms*] holding was very clear that the prerogative is automatic under such circumstances and that no individual or particularized suspicion that the *driver* might be armed is involved. . . . Once the lawfulness of the initial stop of the vehicle is established, nothing more need be shown on a case-by-case basis to justify the incremental intrusion of ordering the *driver* out of the vehicle.

Pet. App. at 7a-9a (emphasis added). Judge Moylan noted:

> In its opinion [in *Mimms*], the Supreme Court made it clear that its focus was very narrow. . . . The only issue before the Supreme Court was the propriety of the [] act of ordering Mimms to step out of the vehicle after it had been stopped.

Id. at 8a. Judge Moylan correctly stated that *Mimms* "was completely silent on the police prerogative, if any, vis-a-vis a passenger." *Id.* at 9a. He stated that once the existence of the passenger was noted in *Mimms*, "the armed passenger dropped totally from sight and the opinion does not further allude to him even obliquely." *Id.* at 10a.

Judge Moylan explained: "The State does not simply argue that . . . *Mimms* should be extended to passengers; it argues that the *Mimms* principle has *already* been extended to passengers," by virtue of dicta in *Rakas* and *Long*. *Id.* at 10a (emphasis added). Judge Moylan criticized the State's reliance on "the most *obiter* of *dicta*[, which] should represent no more to us than the glib blandishments of a snake oil salesman, no matter who wrote them." *Id.* at 11a.

As to *Long*, Judge Moylan stated:

> In . . . *Long*, the Supreme Court was not remotely dealing with a . . . *Mimms* situation. [*Long*] was a case, rather, where there was undeniable articulable suspicion that an individual might be armed and dangerous. . . . The . . . *Mimms* principle itself was not being considered.

Id. at 11a-12a. As to *Rakas*, Judge Moylan stated:

> The citation to *Rakas* is to a footnote in a concurring opinion. The issue for decision in *Rakas* had nothing to do with the police prerogative to order a driver or a passenger to alight from an automobile. It dealt exclusively with the standing of a "mere passenger" to raise a Fourth Amendment challenge to the search of someone else's automobile.

Id. at 13a-14a.

With regard to this Court's use of the word "passenger," instead of the word "driver," Judge Moylan stated:

> The deceptively broad reference to "passengers" was simply wrong. It should, more carefully, have been a more limited reference to "drivers." That distinction, however, was not remotely involved in the discussion and should not be given a significance that was never intended.

Id. at 14a. Regarding this Court's word choices in *Rakas* and *Long*, Judge Moylan stated:

> [The writers did what] opinion writers sometimes do. On an immaterial issue and casually in passing, they characterized . . . *Mimms* as they remembered it, but they remembered it wrongly. They did not put down a pen in mid-sentence and run to the United States Reports for the obvious reason that the passing reference was not in any way the focus of

consideration.

Id. at 15a.

> *Mimms* addressed only the
>
> very narrow question of whether the order to get out of the car, issued [to the driver] after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment,

434 U.S. at 109. Even when the officer had no reason to suspect foul play from the particular driver, at the time of the stop, there was nothing unusual or suspicious about his behavior. Accordingly, *Mimms* stands for the narrow proposition

> that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.

Id. at 111 n.6.

Judge Moylan applied *Mimms*, which was the only applicable Supreme Court precedent, neither extending it, nor narrowing it. At the same time, he put *Rakas* and *Long* into perspective, both vis-a-vis *Mimms*, and vis-a-vis the case at bar. Thus, Judge Moylan's opinion reflects an understanding of the narrow holding in *Mimms*, as well as how *Mimms* was misstated in dicta in both *Rakas* and *Long*.

B. It is unreasonable, under Fourth Amendment jurisprudence, for the police to have the per se power, as to all passengers, in all vehicles, under all circumstances, to demand that the passenger exit the vehicle, when there is no reasonable suspicion of passenger wrongdoing and no threat to officer safety, and the passenger is merely

present when the driver violates a traffic regulation.

1. The seizure of persons requires reasonable suspicion of some wrongdoing, based on specific articulable facts, applying an objective standard. As such, the Fourth Amendment does not permit an automatic right to seize any passenger, when there is no reasonable suspicion as to that passenger. To make such a rule would extend unfettered discretion to the police and insulate their conduct from judicial review.

In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court recognized that in all cases of reasonableness,

> [The] inquiry is a dual one--whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.
>
> . . .
>
> [I]t is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to [seize] against the invasion which the [seizure] entails."
>
> . . .
>
> [T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. [I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, *not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience*.

Id. at 19-21, 27 (emphasis added). *Accord United States v. Sokolow*, 490 U.S. 1, 10 (1989) ("must require the agent to articulate the factors leading to that conclusion.").

In *Delaware v. Prouse*, 440 U.S. 648 (1979), this Court recognized the need for an objective, judicially reviewable standard, when it stated:

> The essential purpose of the proscription in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasion. . . ." Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard . . ."

Id. at 654. *Accord Horton v. California*, 496 U.S. 128, 138 (1990) ("evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer"). In *Prouse*, the Court also stated:

> To insist neither upon an appropriate factual basis for suspicion directed at a particular [individual] nor upon some other substantial and objective standard or rule to govern the exercise of discretion, "would invite intrusions upon constitutionally guaranteed

> rights based on nothing more substantial than inarticulate hunches. . . . " This kind of standardless and unconstrained discretion is the evil that the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.

440 U.S. at 661.

In *Steagald v. United States*, 451 U.S. 204 (1981), this Court stated:

> [A]n "officer engaged in the often competitive enterprise of ferreting out crime" . . . may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty.

Id. at 212.

> [G]ood faith on the part of the [] officers is not enough. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons . . ." only in the discretion of the police.

Beck v. Ohio, 379 U.S. 89, 97 (1964).

In *Dunaway v. New York*, 442 U.S. 200 (1979), this Court observed that "[b]ecause *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Id.* at 210. *See Prouse*, 440 U.S. at 648 (random checks for drivers' licenses and vehicle registration not permitted on less than reasonable suspicion). The Court emphasized that, in *Terry*, it had

> stressed the limits of its holding: the police officer's belief that his safety or that of others is in danger *must be objectively reasonable--based on reasonable inferences from known facts*--so that it can be tested

> at the appropriate time by 'the more detached, neutral scrutiny of a judge,' and the extent of the intrusion must be carefully tailored to the rationale justifying it.

442 U.S. at 209 n.11 (emphasis added).

"[A]n assessment of the whole picture must yield a particularized suspicion that the particular individual being stopped is [or will be] engaged in wrongdoing." *United States v. Cortez*, 449 U.S. 411, 418 (1981). "This *demand for specificity* in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392 U.S. at 21 n.18 (emphasis added).

This Court's analysis, as to passengers, should focus, not on the driver, but on whether the police had a reasonable suspicion to believe that the passenger was engaged in, or is about to engage in, wrongdoing or poses a threat to officer safety. When the justification for requiring a passenger to exit the vehicle is no more than the fact that the driver was speeding, the seizure of the passenger is unreasonable. An officer conducting a traffic stop may detain the driver only as long as is reasonably necessary. Any expansion of the stop, to include investigation of a passenger, should be permitted only if the officer has reasonable articulable suspicion of wrongdoing as to the passenger. *Terry*, 392 U.S. at 27.

The initial stop of the driver, occasioned by the driver's traffic violation, has the incidental effect of also detaining the passenger. This valid initial stop does not violate the Fourth Amendment rights of either the driver or the passenger. However, further seizure of the passenger "would require satisfaction of an individualized suspicion standard." *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990). Without individualized suspicion as to the

passenger, the passenger has the right to resume his journey immediately. In *Prouse*, this Court recognized that notwithstanding the vital interest in highway safety, reasonable articulable suspicion was required to stop a driver. 440 U.S. 648. If there is no reasonable suspicion that the passenger is engaged in wrongdoing or poses a threat to officer safety, then the police may not intrude on the passenger's Fourth Amendment rights.

In the typical traffic stop, there is justification for stopping the driver. This is not the case with respect to passengers. The police have no individualized suspicion to stop the passenger, because the passenger has done nothing wrong. By contrast to the driver, who has committed a traffic violation, the passenger, without more, is merely someone that the "officer has an occasion to speak with [and thus he may not] also order the [passenger] out of the car." *Mimms*, 434 U.S. at 111 n.6. Therefore, any further intrusion on the passenger, beyond the mere inconvenience of being in a stopped vehicle, must be supported by reasonable suspicion, by the officer, as to the passenger.

2. Passengers, like all persons, maintain a high reasonable expectation of privacy in their personal integrity, which is not waived merely by becoming a passenger. Although passengers anticipate a brief delay in their journey if the driver violates a traffic regulation, they should not be subjected to a seizure of their person merely by their presence in the vehicle, absent any wrongdoing on their part.

A passenger's expectation, upon seeing flashing lights, is that the passenger "will be obliged to spend a short period of time [waiting in the vehicle,] but that in the end [the

passenger will] continue on his way." *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984).

Unlike the driver, who is required to produce both a license and registration when stopped, "a passenger is not required to furnish identification or any other documentation." Pet. App. at 20a. Passengers may sit freely in the passenger seat and enjoy the ride, and when stopped, "the passenger is presumptively free to abandon the driver to the clutches of the law and hail a cab." *Id.*

The reasonable suspicion as to the driver cannot be transferred to the passenger merely because of passenger status. A citizen's "mere presence" in a suspected vehicle, or "mere presence" with others suspected of wrongdoing, is insufficient to establish reasonable suspicion as to the citizen who is merely present.

In *United States v. Di Re*, 332 U.S. 581 (1948), this Court held that probable cause to search a vehicle does not permit the police to search the person in the vehicle. *Id.* at 586. "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Id.* at 587. The police had no information regarding Di Re other than "his presence." *Id.* at 592. "*Presumptions of guilt are not lightly to be indulged from mere meetings.*" *Id.* at 593 (emphasis added).

In *Sibron v. New York*, 392 U.S. 40 (1968), the defendant was seen talking to known narcotics addicts over an eight-hour period. The police did not know Sibron, had no information about him, did not hear any of the conversations, and saw nothing pass. "So far as [the officer] knew, they might indeed 'have been talking about the World Series.'" *Id.* at 62. Mere association "is simply not the sort of reasonable inference required to support an intrusion by

the police upon an individual's personal security." *Id.*

In *Ybarra v. Illinois*, 444 U.S. 85 (1979), the police had a warrant to search a tavern and to search the bartender. Upon entering, the officers announced that they were going to conduct a "cursory search for weapons." *Id.* at 88. "The agents knew nothing in particular about Ybarra, except that he was present." *Id.* at 91. This Court stated: "Each patron . . . was clothed with constitutional protection against . . . an unreasonable seizure." *Id.* The initial valid intrusion "gave [the police] no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." *Id.* at 92. "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to [a valid Fourth Amendment intrusion of] that person." *Id.* at 91.

In *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam), the agent believed that Reid fit a "drug courier profile." *Id.* at 440. This Court concluded that "the agent's belief . . . was more an 'inchoate and unparticularized suspicion or 'hunch' than a fair inference in the light of his experience." *Id.* at 441. The Court observed that these "circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." *Id.*

As stated in *Katz v. United States*, 389 U.S. 347, 351 (1967), "the Fourth Amendment protects people, not places." The passenger of a vehicle is subject to the brief detention that is required when an officer pulls over the speeding driver. However, the driver's infraction does not lower the passenger's expectation that the passenger will be free from an additional seizure directed at the passenger.

Citizens do not waive the Fourth Amendment, upon

entering an automobile. *See Prouse*, 440 U.S. at 663. A passenger in a vehicle enjoys the same "everyday expectations of privacy that we all share." *Minnesota v. Olson*, 495 U.S. 91, 98 (1990). "[T]he exercise of one's desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion." *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974). Even a passenger in a taxicab may rely upon the protection of the Fourth Amendment. *See Katz*, 389 U.S. at 352.

Although a passenger may lack standing to complain about the search of the driver's vehicle, the passenger never lacks standing to challenge the legality of his detention pursuant to a traffic stop. *See Rakas*, 439 U.S. 128. To the extent that this Court recognizes a lesser expectation of privacy in vehicles, such a lesser expectation relates only to the personal effects within the vehicle, but does not mean a lesser expectation of privacy as to the integrity of the person. *See Cardwell*, 417 U.S. at 590.

In *Prouse*, this Court stated:

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. [P]eople are not shorn of all Fourth Amendment protection when they step from their homes [into their automobiles.]

440 U.S. at 662-63.

It is virtually impossible to function in our society without the use of a vehicle and public roads. In 1993, of the 197,663,000 Americans of driving age, 173,149,313 were licensed. Federal Highway Administration, U.S. Dept. of Transportation, Pub. No. FHWA-PL-95-028, *Our Nation's Highways: Selected Facts and Figures* 42-45 (1995). Thus, 87.6% of all persons of driving age were licensed. In Maryland, in 1993, there were 3,274,392 licensed drivers, constituting 85.2% of the State's driving-age population. *Id.* If more than 85% of the driving-age population has a license, driving is part of the very fabric of our society.

Not only do seven out of every eight Americans of driving age possess a driver's license, they extensively use this privilege to meet the demands of their everyday lives. In 1993, the number of vehicle miles traveled in this country, per licensed driver, was 13,264. *Id.* at 45. In Maryland, the number was 13,227. *Id.* "American's motor-vehicle travel in 1993 reached 2.3 trillion vehicle miles, an average of 11,834 miles [per vehicle]. Automobiles are responsible for 70.7 percent of this travel." *Id.* at 1. The average driver spends approximately 365 hours per year driving a vehicle. *Id* at 31. To say that "vehicular travelers voluntarily subject themselves to the highly regulated environment of public thoroughfares," Pet. Brief at 12, is to say that once any American steps off the front porch step, and into the minivan to go to work, to school, or to play, or steps onto a bus operated by a mass transit system, that person has elected to become the subject of a suspicionless seizure. That is simply not the reality of our society's relationship with vehicular travel.

3. A mere incremental additional intrusion upon a

driver, who has already been lawfully intruded upon, is de minimis. However, when the police demand that a passenger exit the vehicle, despite a lack of any reasonable suspicion of wrongdoing by the passenger, such an intrusion upon the passenger's Fourth Amendment rights is not de minimis and is unconstitutional.

In *Mimms*, this Court placed great importance on the fact that the driver had already been lawfully stopped. The only valid reason for the police to stop the vehicle is the individualized suspicion as to the driver, based on the driver's wrongdoing. If so, the police may require the driver to exit the vehicle, allowing the officer to make that de minimis additional intrusion upon the driver. "[T]he police have already *lawfully decided* that the driver shall briefly be detained; [and] the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it." 434 U.S. at 111 (emphasis added). The Court even noted, in response to Justice Stevens's dissent, that "[w]e hold only that once a motor vehicle has been *lawfully detained* for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Id.* n.6 (emphasis added).

Although requiring the driver to exit the vehicle is a mere de minimis additional intrusion upon the driver, such an intrusion upon an innocent passenger cannot be deemed de minimis. Demanding that a passenger exit the vehicle is a significantly more pronounced invasion of the passenger's Fourth Amendment rights than it is upon the driver's rights. This already greater intrusion upon the passenger results from the fact that, although the driver has been detained

based on his own wrongdoing, the passenger has been detained, not based on his own wrongdoing, but based on someone else's wrongdoing. Without reasonable suspicion of wrongdoing, on the part of the passenger, any police intrusion into the passenger's Fourth Amendment rights, is significant, is unconstitutional, and is not de minimis.

Unlike the driver, who is in control of the vehicle, and who violates the law, thereby invoking a valid stop, the passenger has no control over the vehicle and presumptively commits no wrongdoing. "The passenger may not be issued a traffic ticket or citation, let alone be subjected to custodial arrest." Pet. App. at 20a. "The passenger is not required to furnish identification or any other documentation." *Id.* "The passenger is presumptively free to abandon the driver to the clutches of the law and hail a cab." *Id.* Indeed, if the passenger is in a hurry, the passenger may exit the vehicle and hail a taxi to reach the desired destination.

> [A]utomobiles are justifiably the subject of pervasive regulation by the State, [and e]very *operator* of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that *operator's* privacy."

New York v. Class, 475 U.S. 106, 113 (1986) (emphasis added). These reasonable intrusions for inspection, licensing, and traffic ordinance violations are directed at the operator. A passenger, by contrast, has no obligation to conform to such pervasive regulations, other than obeying applicable laws, e.g., wearing a seatbelt.

In the case at bar, the initial interference imposed on both the driver and passenger was the traffic stop based on the driver's speeding. Pet. App. at 2a. Because there was no reasonable suspicion of any wrongdoing on the part of the passenger, the scope of that stop should have begun and

ended with the driver. Any intrusion on the passenger, beyond the initial stop, cannot be justified solely by the initial valid stop of the driver. Police action with respect to passengers must be judged independent of the driver. The initial "detention of the passenger[] [was] no more than an inevitable incident of the stopping of the car." Pet. App. at 21a. The subsequent seizure, however, was neither inevitable nor incidental.

Wilson was seized solely by virtue of being a passenger in a vehicle in which the driver was speeding. It was not Wilson's wrongdoing that caused the stop, and Wilson's mere presence in a vehicle with a traffic violator does not make Wilson a suspect. "[A] traffic stop per se does not, without more, focus suspicion on a passenger as either a wrongdoer or as a possible source of danger to the officer." Pet. App. at 23a. Thus, the officer's action of requiring Wilson to exit the vehicle was, as to Wilson, a significant additional intrusion, with no justification, and thus not de minimis.

Moreover, if *Mimms* is extended to passengers, then presumably if a passenger can be automatically required to exit a vehicle, the passenger can automatically be required to remain in the vehicle -- in both scenarios -- absent reasonable suspicion that the passenger poses a threat to officer safety. The State concedes that to adopt its proposed *Mimms* extension, permitting the police to automatically demand that a passenger exit a vehicle, once that vehicle has been lawfully stopped, would permit the police to automatically make a passenger remain in the vehicle.[4] To

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[4]This situation is pending before this Court in *Dennis v. State, 342 Md. 196,* 674 A.2d 928, *petition for cert. filed,* 65 U.S.L.W. 3085 (July 18, 1996) (No. 96-112).

deny to the passenger, in a vehicle stopped for speeding, the right to exit the vehicle and to hail a cab would constitute an even better intrusion on the passenger.

The State argues that the intrusion as to the passenger is de minimis simply because the passenger is not being asked to move far. This Court has never held that the "size" of the intrusion determines whether the intrusion is unreasonable. This is evidenced by this Court's decision in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), in which the officer's mere "squeezing, sliding and otherwise manipulating the content's of the . . . pocket," of an otherwise validly frisked person, violated the Fourth Amendment. *Id.* at 378. If the intrusion "goes beyond what is necessary . . . it is no longer valid . . . and its fruits will be suppressed." *Id.* at 373.

In *Dickerson*, the police already possessed reasonable suspicion that the citizen posed a threat. Nonetheless, it violated the Fourth Amendment to go beyond the permissible scope of intrusion. In this case, unlike *Dickerson*, there was no reason whatsoever for the additional seizure of the passenger. Accordingly, it was an even greater intrusion to require Wilson to exit the vehicle than it was, in *Dickerson*, to discern evidence, by the touch of outer clothing, during a valid frisk for weapons.

In *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), this Court held that if an officer has an arrest warrant or a search warrant, knows that the suspect possesses a firearm, and knows that the suspect has been dealing drugs, a balancing test must be conducted to determine if it is reasonable for the police to make the "additional intrusion" of failing to "knock and announce" before executing the warrant. The failure to knock and announce is clearly less intrusive than seizing a passenger. If a balancing test is required for the additional intrusion of not knocking and announcing, a balancing test

surely should be required when the police order a passenger, for whom there is no reasonable suspicion of wrongdoing, to exit a vehicle.

In *Maryland v. Buie*, 494 U.S. 325 (1990), even with an underlying valid arrest, this Court rejected even a limited protective sweep unless the "officer possesses reasonable belief based on *specific and articulable facts* that the area to be swept harbors an individual posing danger to those on arrest scene." *Id.* at 337 (emphasis added). This Court stated:

> [D]espite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule . . . for . . . all confrontational encounters. Even in high crime areas, where the possibility that a given individual is armed and dangerous is significant, *Terry* requires reasonable, individualized suspicion . . .

Id. at 334 n.2.

When the police demand that a passenger exit the vehicle, despite a lack of any reasonable suspicion of wrongdoing by the passenger, such an intrusion upon the passenger's Fourth Amendment rights is not de minimis and is unconstitutional.

4. The State's reliance on *Summers* and *Acton* is misplaced. The additional intrusion in *Summers* was permitted primarily because of the underlying judicial determination of probable cause, in the context of a validly executed warrant. The intrusion in *Acton* was permitted solely because it applied equally to all public school athletes and was not subject to the unfettered discretion of a particular governmental official.

The State relies on *Michigan v. Summers*, 452 U.S. 692 (1981), in arguing that the governmental interest in officer safety outweighs the intrusion on the passenger. In *Summers*, in permitting the police to require a resident to remain on the premises while the police executed a search warrant, this Court stated:

> *Of prime importance* in assessing the intrusion *is* the fact that the police obtained *a warrant* to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there.

Id. at 701 (emphasis added).

In *Summers*, the incremental intrusion was reasonable because there was a probable cause determination, by a neutral and detached magistrate. In this case, however, there was no determination by the trooper -- much less by a neutral and detached magistrate -- of probable cause -- much less of reasonable suspicion -- as to Wilson. The only determination was that the vehicle and its driver could be stopped for a traffic violation. When Wilson was seized, merely by his presence in the vehicle, the officer had made no determination linking Wilson with any wrongdoing.

In *Summers*, this Court emphasized that

> the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention.

Id. at 701. Unfortunately, traffic stops are ripe for such exploitation by the police.

The State relies on *Vernonia School Dist. 47J v. Acton*,

115 S. Ct. 2386 (1995). In *Acton,* the suspicionless intrusion was permitted because "the subjects of the [school drug testing] Policy [for athletes] are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." *Id.* at 2391. This Court stated:

> The most significant element in this case is . . . that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.

Id. at 2396. "[T]he nature of [the State's] power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Id.* at 2392.

The Court addressed the low expectation of privacy of school athletes, analogizing school athletes to

> adults who choose to participate in a "closely regulated industry," [in that] students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

Id. at 2393. The student athletes were even more like adults in closely regulated industries in that they were placed on notice that they would be tested for drugs through a consent form they were required to sign. *Id.* at 2394.

"Special needs" cases contain guidelines and controls to ensure that officials conducting the intrusion do not act arbitrarily or for the wrong motives. In *Acton,* every student athlete was required to submit to a drug test at the beginning of each season. *Id.* at 2389. In addition, once a week, during the season, the names of all the athletes were placed in a pool from which a fellow student, with the supervision of two adults, blindly drew the names of 10% of the athletes for random testing. *Id.* at 2388-89. This system ensured that no

student would be targeted for drug testing based on behavior, popularity, or any other arbitrary factor. Indeed, the Court found the guarantees of impartiality, created by subjecting all student athletes to drug testing, to be of upmost importance.

There are two important reasons why *Acton* cannot be argued to extend *Mimms* to passengers. First, all the student athletes were tested. Not only will all passengers, in all vehicles, not be required to exit the vehicle, but probably only a very few passengers will be selected. Second, in *Acton,* there was no discretion by school officials as to which students were tested. To the contrary, the police will have unfettered discretion, lacking judicial review, as to the "if," the "when," the "where," and the "who," regarding any police demand to exit the vehicle. The only way to make this case analogous to *Acton* would be to require all police, to require all passengers, to exit all vehicles, every time a stop is conducted.

The Court also found it "significant that the tests at issue here look only for drugs." *Id.* at 2393. The procedures ensured that the tests would not be used for any other purpose, and an independent laboratory conducted the urinalysis. There are no such measures to limit the scope and purpose of random seizures when the police demand that a passenger exit a vehicle, yet the police lack particularized suspicion as to the passenger.

In each of the relevant cases, at least one of two constitutional safeguards was present that is not present in this case. In *Mimms* and *Summers*, there was a prior lawful intrusion as to the person or the premises. In *Acton*, like in other administrative searches and fixed checkpoint stops, there was a strong regulatory scheme to ensure that the police did not abuse their discretion. For every case that does not come within one of these two categories, this Court

has always required individualized suspicion as a prerequisite to a Fourth Amendment intrusion.

C. If this Court were to extend *Mimms* to passengers, much of the reasonableness analysis, slowly and carefully evolved by this Court since *Terry*, would be overruled.

If *Mimms* were extended to passengers, much of the Fourth Amendment protections against unreasonable seizures would be overruled. In *Terry*, this Court observed:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure of the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?

392 U.S. at 21-22.

Only by holding that the 25 plus million passengers stopped annually are all presumed to pose a threat to officer safety could this Court justify extending *Mimms* to passengers. Alternatively, this Court would have to permit every traffic violation, as to the driver, to be transferred to the passenger, based solely on the passenger's presence in the vehicle. In either event, to so hold, this Court would obliterate the very protections that comprise the Fourth Amendment.

1. To permit the police, under a per se rule, to remove any passenger, at any time, from any vehicle, based solely on a traffic violation of the driver, without requiring any level of suspicion as to the passenger, would unconstitutionally extend unfettered discretion to the police and would unconstitutionally place the conduct of the police beyond judicial review.

In *Brinegar v. United States*, 338 U.S. 160 (1949), Justice Jackson recognized two Fourth Amendment truths: (1) wherever the Court draws the line, the police "will push to the limit," and (2) citizens cannot prevent Fourth Amendment abuses. *Id.* at 182 (Jackson, J., dissenting). He further reflected:

> [A]n illegal . . . seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposefully beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests . . . are often at stake. . . . There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.
>
> And we must remember that the authority which we concede to conduct . . . seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible . . .

Id.

If the police have the automatic right to require a passenger to exit a vehicle, with no reasonable suspicion as to the passenger, this detention scenario is more likely to be exploited by the police or unduly prolonged. If the passenger, whose only involvement is a mere presence in a

vehicle being stopped for a traffic violation, is required to exit the vehicle, why was this passenger selected, while perhaps 999 other passengers, each of whom similarly posed no threat to officer safety, were not?

To approve the seizure of innocent passengers, with no reasonable suspicion of any wrongdoing, subjects innocent passengers "to potentially unlimited interference with their use of the highways, solely at the discretion of the [police.]" *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975). If this Court were to extend *Mimms*, the "[t]roublesome problem of selective enforcement," *United States v. Flum*, 518 F.2d 39, 48 (8th Cir. 1975) (Heaney, J., dissenting), will become evident, and there will be no constitutional roadblock to, and no judicial review of, such unconstitutional police conduct.

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), this Court held that fixed check point stops do not violate the Fourth Amendment because, by stopping all vehicles, there is little opportunity for the police to abuse their discretion. However, the Court held that random stops, without reasonable suspicion, do violate the Fourth Amendment because there are no guidelines to prevent abuse by the police. *Id.* at 559. The "discretion of the official in the field," *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967), may not be unfettered, but must be supported by objective criteria demonstrating a reasonable suspicion.

Just last term, in *Whren v. United States*, 116 S. Ct. 1769 (1996), this Court held that an officer's motivation is not relevant, provided there is probable cause. The Court distinguished *Florida v. Wells*, 495 U.S. 1 (1990), *Colorado v. Bertine*, 479 U.S. 367 (1987), and *New York v. Burger*, 482 U.S. 691 (1987), from the case before it. In the distinguished cases, the "ulterior motives" of the police

mattered, while in *Whren*, the "ulterior motives" did not matter, because the intrusion was supported by probable cause. In the case now before the Court, the additional intrusion on the passenger was not conducted with reasonable suspicion as to the passenger, much less probable cause. Thus, in this case, unlike in *Whren*, the lack of probable cause necessitates a rule that precludes unfettered police discretion.

If the police have the automatic right to require a passenger to exit the vehicle, with no Fourth Amendment justification required, and no mechanism for judicial review, the police may act solely on the passenger's appearance, age, race, or gender. It is this type of unfettered discretion that makes the seizure of the passenger unreasonable and violates the Fourth Amendment. The fear of being arbitrarily "selected" is particularly strong in minority communities, in which a citizen, merely because of skin color, may meet an officer's profile of a drug dealer. *See Derricott v. Maryland*, 327 Md. 582, 611 A.2d 592 (1992).[5]

In *Terry*, one of the concerns of this Court was the potential for abuse by officers if a standard less than probable cause were employed. 392 U.S. at 14-15. The Court, in assuaging its concern that minority members would be unfairly seized, stressed that it is vital that the exclusionary rule be administered by the judiciary and not by the police. *Id.* at 15. Unfortunately, the tension between the

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[5]In *Derricott*, the officer testified that the defendant was stopped because he matched characteristics listed on a drug courier profile, as follows; (1) *young, black males* wearing expensive jewelry, (2) driving expensive cars, usually sports cars, (3) carrying beepers, and (4) in possession of telephone numbers. 327 Md. at 585, 611 A.2d at 594 (emphasis added).

police and minority communities is just as profound -- if not more profound -- 28 years after *Terry*, as it was at the time of *Terry*.[6]

If *Mimms* were extended to passengers, any officer, with no reasonable suspicion as to any passenger, would nonetheless be able to select any passenger for seizure. With no criteria for selection, and with no opportunity for judicial review, this Court should be concerned about the potential 50 million plus seizures. Recognizing that only one in 1,000 passengers will likely be required to exit the vehicle, this Court should be even more concerned about the grave potential for arbitrary selection and enforcement.

It is unconstitutional to grant to the police unbridled discretion to conduct seizures of citizens, with no requirement for reasonable articulable suspicion as to the targeted citizen. Not only will the police have unfettered discretion to engage in fishing expeditions for evidence, the reasonableness of their actions will forever escape judicial

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[6]*See, e.g.*, Gregory Kane, *Giving Unhappy Readers Their Say in Print Again*, Balt. Sun., Jul. 13, 1996, at 1B (75% of the stops made by the Maryland State Police are of African Americans); *ACLU Accuses Police of Race-Base Stops*, Pantagraph (Bloomington Ill.), Aug. 31, 1994, at A4 (ACLU filed a class-action suit against the Illinois State Police, alleging illegal stops of vehicles driven by African Americans and Hispanics); Debra Dennis, *Judge Gives Green Light to Lockland Police Lawsuit*, Cin. Post., Mar. 23, 1994, at 9A (police accused of illegal stops of African American drivers); Joe Schoenmann, *City Exec Calls Meeting on Traffic Tickets, Race*, Wis. St. J., Jun. 7, 1996, at 2A (African American drivers ticketed more than whites); Dennis Hoffman, *Is Patrol Making Race-Based Stops?*, Omaha World-Herald, Oct. 13, 1994, at 25 (minority drivers accused state police of making illegal, racially-based traffic stops to search for drugs).

review.

If the Court extends *Mimms* to passengers, it will be holding, for the first time, that the seizure of a citizen, without particularized suspicion, and without external procedures and guidelines, is reasonable. Moreover, this Court would be ruling that regardless of how few passengers are seized, and regardless of how arbitrary the selection process, such seizures are preapproved, as constitutional, and are not subject to judicial review.

2. Even the important governmental interest in officer safety should not serve as the basis to retreat from the Fourth Amendment requirement of an objective standard of reasonableness, subject to judicial review, to which this Court has steadfastly adhered.

The State argues that based on a compelling governmental interest in officer safety, this Court should adopt a per se rule permitting the police to automatically demand that all passengers exit a validly stopped vehicle, even when there is no reasonable articulable suspicion as to the passenger. The State argues: "During the time taken to analyze the legal ramifications of their conduct, officers could be overpowered, injured or killed." Pet. Brief at 21.

The possibility that officers could be "overpowered, injured, or killed" is at least as real, if not more real, in many other Fourth Amendment encounters. However, this Court has not repealed the Fourth Amendment. Instead, this Court has held that the governmental interest in officer safety is only sufficiently compelling to justify a Fourth Amendment intrusion when there is reasonable suspicion as to the particular individual. Police officers face risks everyday, and if this Court were to hold that this risk outweighs the

resulting intrusion on the privacy and security of the persons so detained, there would be no need for the Fourth Amendment, and such a decision would, in effect, overrule *Terry* and its progeny.

Both the State and the United States argue that officer safety should permit the police to automatically demand that all passengers exit validly stopped vehicles. They cite statistics that of the 587,474 officers assaulted between 1985 and 1994, 10.5% were assaulted while conducting traffic stops and pursuits, and of the 708 officer feloniously killed between 1985 and 1994, 13.7% were killed while conducting traffic stops and pursuits. U.S. Brief at 8-9. In 1994, 5,762 officers were assaulted, Pet. Brief at 18 n.8, and 11 officers were feloniously killed. Federal Bureau of Investigation, U.S. Dept. of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* 33 (1994). These statistics give the appearance that when an officer makes a traffic stop, the officer has a disproportionately high risk of injury. That is incorrect.

The only reason that 10.5% of police assaults arise from traffic stops and pursuits is that traffic stops and pursuits are probably, by far, the most frequent type of encounter between the police and the public. From July 1, 1994, through June 30, 1995, there were 1,088,982 criminal misdemeanor traffic court cases filed in the District Court of Maryland. Annual Report of the Maryland Judiciary 80 (1994-1995). This probably means at least one million tarffic stops annually in the State of Maryland alone. Although some defendants have multiple traffic violations arising from one incident, the judiciary's one million plus cases do not include those stops that resulted in only verbal warnings and reprimands, in written warnings, in safety violation orders, and in other encounters not resulting in a

traffic court case.

In 1993, Maryland had 3,274,392 of the nation's 173,149,313 licensed drivers. Our Nation's Highways at 44. If Maryland had 1.89% of the nation's licensed drivers, presumably Maryland had approximately 1.89% of the traffic stops. If so, the annual number of traffic stops nationwide approximates 50 million. If, when considering the typical range of zero to four passengers per vehicle, the average is 0.5 passengers per stopped vehicle, there are approximately 25 million passengers each year who are in vehicles in which the driver is stopped. This means that one out of every 10,000 (.0001) traffic stops results in an officer being assaulted, and two out of every 10 million (.0000002) traffic stops results in an officer being killed. Although these numbers are, of necessity, inexact, they perhaps demonstrate why approximately 10 officers are killed annually, throughout our nation, during traffic stops and pursuits. It is not because traffic stops are inherently dangerous -- or at least no more dangerous than many other types of citizen-police encounters. Rather, it is because traffic stops constitute, by far, the most frequent encounter between the police and the public.

Although officer safety is a valid concern, it does not justify giving officers unfettered discretion to seize a passenger with no particularized suspicion. The risk to an officer's safety is not, without more, heightened by the mere presence of a passenger in a car that has been stopped for a traffic violation. In 1994, of the 76 officers feloniously killed, 11 officers were killed during traffic pursuits or traffic stops. *Law Enforcement Officers Killed and Assaulted* 33 (1994). An analysis of the Summaries of Felonious Incidents reveals that of those 11 officers killed, only one was killed by a passenger during a routine traffic stop. *Id.* at

43-60. Furthermore, the number of officers reported killed by passengers, from 1984 through 1994, was only 7.[7]

> This is not the only dangerous era this Court has known. The Court that decided *Carroll v. United States*, sat during a period in our history when the Nation was confronted with a law enforcement problem of no small magnitude--the enforcement of the Prohibition laws. But that Court resisted the pressure of official expedience against the guarantee of the Fourth Amendment.

Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973). The test has been -- and should remain -- a "balance between . . . the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual." *Terry*, 392 U.S. at 26. There is danger in police work. However, that does not justify a repeal of the Fourth Amendment.

3. Even if officer safety were sufficient justification for (1) overruling the requirement of reasonable suspicion, and (2) eliminating judicial review as a check on police discretion, extending *Mimms* to passengers will not accomplish the desired goal. There is no evidence to indicate that a rule providing unfettered discretion to the police will enhance officer safety.

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[7]An additional fifteen officers were killed by unknown assailants, and four were killed in assaults attributed to a combined driver-passenger effort. Federal Bureau of Investigation, U.S. Dept. of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* (1984-94).

The State argues that extending *Mimms* to passengers would increase officer safety. There is no evidence to indicate that a rule providing unfettered discretion to the police would enhance officer safety. As the statistics cited by the National Association of Police Organizations demonstrate, the number of police killed during traffic stops has remained quite constant, both before and after this Court's holding in *Mimms*. NAPO Brief at 6. Apparently, requiring drivers to exit the vehicle, during routine traffic stops, has had minimal impact, and it certainly provides no evidence for extending *Mimms* to passengers. *See Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted.*

Even if officer safety were sufficient to justify overruling the requirement of reasonable suspicion and eliminating the requirement of judicial review as a check on police discretion, extending *Mimms* to passengers will not accomplish the desired goal. There is no evidence that allowing officers, absent reasonable suspicion that a passenger poses a threat, to require a passenger to exit a vehicle will further the government interest in officer safety. There is no evidence that the police are more or less safe in jurisdictions that have or have not extended *Mimms* to passengers. Accordingly, this Court should preserve the requirement of reasonable suspicion because its elimination will not enhance officer safety.

Moreover, if threat to officer safety is at issue, such as to justify requiring passengers to exit, then officer safety cannot be accomplished simply by requiring the passenger to exit the vehicle. If passengers do pose a per se threat to the police, then the police need to conduct a frisk of every passenger and/or to conduct a search of the interior of every vehicle. Otherwise, the officer will remain in danger while

the passenger remains outside the vehicle.

Thus, if *Mimms* should be extended to passengers, on a per se basis, then this Court also would have to extend *Terry*, to the 25 million passengers, on a per se basis, permitting a frisk of every one of them, and this Court would also have to extend *Long* to every vehicle in which the 25 million passengers ride, on a per se basis, permitting a search of every one of them.

Because the needed result cannot be accomplished simply by requiring the passenger to exit the vehicle, unless the police also frisk the passenger and search the vehicle, there is no justification for requiring the passenger to exit the vehicle. Moreover, if passengers do pose a threat to officer safety, the officer, by ordering the passenger to exit the vehicle, increases the danger, by providing to the former passenger an even greater freedom to maneuver and cause harm.

D. No Fourth Amendment issue could be less appropriate for the adoption of a bright-line rule than the issue now before this Court. The State's proposed rule would "draw the line" in such a way as to extend unfettered discretion to the police, and thus insulate police conduct from judicial review. Moreover, by applying a bright-line rule in the context of the most frequent of all citizen-police encounters, this Court would be deeming an almost limitless variety of situations to be constitutionally indistinguishable.

This Court has recognized the need to provide guidance to both the police and lower courts, while, at the same time, maintaining the necessary flexibility through a case-by-case determination of the reasonableness of particular police

practices. In this context, the Court has acknowledged that per se rules, with precise boundaries, applicable to all situations, regardless of the factual variations, are not appropriate in many Fourth Amendment contexts.

In some cases, this Court has set forth strict rules or standardized procedures. *See, e.g., New York v. Belton*, 453 U.S. 454 (1981); *Summers*, 452 U.S. 692; *Dunaway*, 442 U.S. 200; *Robinson v. United States*, 414 U.S. 218 (1973). In other cases, this Court has established a flexible reasonableness balancing analysis. *See, e.g, Terry*, 392 U.S. 1; *Michigan v. Thomas*, 458 U.S. 259 (1982); *United States v. Ross*, 456 U.S. 798 (1982); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Cardwell*, 417 U.S. 583; *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Prouse*, 440 U.S. 648; *Brignoni-Ponce*, 422 U.S. 873; *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Ortiz*, 422 U.S. 891(1975).

All of the cases in which this Court has established bright-line rules in Fourth Amendment scenarios are distinguishable from the instant case. In *Robinson*, and *Belton*, the defendants were lawfully arrested before the Fourth Amendment intrusion took place. In *Summers*, the initial intrusion was based on a valid search warrant. Because the probable cause standard was satisfied, this Court held that no additional justification was required for a per se rule. On the other side, in *Dunaway*, this Court established a bright-line rule to protect citizens, holding that custodial interrogation requires probable cause. In so doing, this Court did not abandon, but actually employed, a balancing test, stating that "the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that

seizures are 'reasonable' only if supported by probable cause." 442 U.S. at 214.

In this case, there was no warrant, no probable cause to arrest, no probable cause to search, no reasonable suspicion that the driver posed a threat, no reasonable suspicion that the passenger posed a threat, and no reasonable suspicion that the passenger was involved in wrongdoing. There was nothing more than a traffic violation, for speeding, on the part of the driver. There is no precedent of this Court, and no logical reason, to establish a bright-line rule, in this case, permitting officers to automatically demand that passengers exit vehicles, when the police lack reasonable suspicion as to the passenger. A *Mimms* extension to passengers would not be a bright-line rule that could safeguard both the Fourth Amendment rights of citizens and the safety of officers.

Even Professor LaFave, whose support for bright-line rules was quoted by this Court in *Belton*, has recognized that bright-line rules are not appropriate for all Fourth Amendment scenarios. Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith,'* 43 U. Pitt. L. Rev. 307, 323 (1982). To determine when a bright-line rule is appropriate, Professor LaFave poses the following questions: (1) Does the rule have clear and certain boundaries, so that it makes case-by-case evaluation and adjudication unnecessary? (2) Does the rule produce results approximating those that would be obtained if accurate case-by-case application of the underlying principle were practicable? (3) Is the rule responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable? (4) Is the rule not readily susceptible to manipulation and abuse? *Id.* at 325.

In this case, the answer to each question is "no." On first

blush, the State's proposed bright-line rule appears to have clear and certain boundaries, making case-by-case evaluation unnecessary. However, such a rule is not so clear or certain as it first appears. Unlike the lone driver, there may be no passengers, one passenger, or multiple passengers, ranging in number from zero to six in most vehicles, and many more in vans and buses. Which passengers would the police be allowed to require to exit the vehicle? The front seat passenger? The front seat and the back seat passengers? All passengers in an automobile? All 60 passengers on a bus? Can the police order all passengers to exit the vehicle during the day, or only at night when the officer's ability to see activity inside the vehicle is hindered?

Furthermore, passengers are different than drivers, and passengers are different than each other. The driver always has a possessory interest in the vehicle, always has essentially the same degree of control over the vehicle, and always has essentially the same reasonable expectation of privacy. This is not so with passengers. Some passengers own the vehicle, and some are mere hitchhikers. Some passengers are 100 years old, and some are 100 hours old. Although some passengers are sitting next to the driver, awake, reading the map, and giving directions, others are asleep under the covers in the back of a mobile home or comatose in the back of an ambulance. Would the Court mean to create a bright-line rule to permit the police to require infants with pneumonia, or elderly persons, or the profoundly retarded, or the severely handicapped passengers, who pose no apparent threat to officer safety, to exit the vehicle, in the pouring rain, late at night?

In reality, the police will probably only be requiring passengers to exit vehicles when the police either believe there is an issue of officer safety, or when the police are

abusing the power that comes with a per se rule by "fishing" for evidence. In the former scenario, like in this case, the suppression judge, as fact finder on the suppression motion, can resolve the issue, on a case-by-case basis, like the majority of Fourth Amendment issues. In the latter scenario, the law needs a mechanism to review police conduct. Neither the police, nor the courts, need a per se rule, particularly if that rule means that Fourth Amendment rights may be unconstitutionally trampled, without a means of judicial redress, by such a per se rule.

With regard to Professor LaFave's second and third inquiries, a bright-line rule in this situation would not produce results approximating those that would be obtained in an accurate case-by-case analysis. Individual officers, based on individual assessment, of individual situations, are in the best position to determine when their safety is threatened. If an officer has reasonable suspicion of a threat to officer safety, that officer, in that situation, may order the passenger to exit the vehicle, regardless of whether a bright-line exists. The officer would be able to articulate the individualized suspicion that caused that officer to require the passenger to exit the vehicle.

Under a case-by-case evaluation, which is performed every day by the police, some situations lead to an order to exit the vehicle, but most do not. Of those situations in which passengers are required to exit the vehicle, some situations lead to evidence being obtained, but most do not. Of those situations in which evidence is obtained, some situations lead to criminal charges, with an eventual trial and/or plea bargain, with a fully litigated suppression hearing, but most do not. Of those suppression motions actually litigated, probably the vast majority result in the suppression judge being persuaded by the officer's

articulation of a reasonable suspicion of a threat to officer safety, and the evidence is admitted. This case presents what is probably the rare scenario, in which evidence is suppressed, because the fact finding judge was not persuaded that the officer, at the time of the intrusion, had a reasonable suspicion of a threat to officer safety.

The State's response is to seek a per se rule to insulate the conduct of the police from judicial review. Judicial review should be recognized as working just as well in the small minority of situations in which evidence is suppressed as it does in the vast majority of situations in which evidence is admitted. Moreover, new bright-line rules should not be drawn when the existing doctrine is not causing serious problems in day-to-day practice. Accordingly, there is no demonstrated need to forego the current case-by-case analysis.

Finally, addressing Professor LaFave's fourth question, a bright-line rule in this situation is subject to manipulation and abuse. As Justice Stevens noted in his dissent in *Mimms*, "to eliminate any requirement that an officer be able to explain the reasons for his actions . . . leaves police discretion utterly without limits. . . . Some citizens will be subjected to this minor indignity while others--perhaps those with more expensive cars, or different bumper stickers, or different colored skin--may escape it entirely." 434 U.S. at 122. This unfettered discretion would apply to passengers as well.

In addition, bright-line Fourth Amendment rules may fail in their mission of simplifying the administration of justice for essentially two reasons. Albert W. Alschuler, *Bright Line Fever and The Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 231 (1984). First, establishing a specific rule for every possible Fourth Amendment encounter between the police

and citizens will inevitably result in the creation of so many rules that the police will not be able to remember or properly apply such rules. *Id.* Second, due to the diversity of the types of encounters between the police and citizens, bright-line rules are ineffective due to their rigidity. *Id. See* Terence C. Gill, Note, *Regulating the Police in Investigatory Stops: A Practical Alternative to Bright Line Rules*, 59 S. Cal. L. Rev. 183 (1985); Gerald G. Ashdown, *Good Faith, The Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process*, 24 Wm. & Mary L. Rev. 335 (1983).

When the appropriate blend of law and discretion cannot be determined "in the large," as in the instant case, the issue must be resolved "in the specific," by examining the facts and circumstances of a particular rule. Alschuler, *supra* at 227. Case-by-case adjudication, as to passengers, provides the balance necessary to ensure officer safety and to protect against Fourth Amendment violations. If the bright-line rule, as urged by the State, were to be adopted, on this issue, injustice would most often result. Countless individuals would needlessly have their Fourth Amendment protections violated. This degree of injustice far outweighs any benefit of such a rule. A bright-line *Mimms* rule for passengers would subject millions of passengers to arbitrary and unjustified intrusions, with no avenue of redress, in a well-intended, but unsuccessful, attempt to lessen the potential danger to officers making traffic stops.

"[T]he quest for clear rules must proceed with caution if reasonable and predictable results are in fact to be obtained." LaFave, *supra* at 333. "[A]s Justice Rehnquist has noted: 'Our entire profession is trained to attack 'bright lines' the way hounds attack foxes. Acceptance by the courts of arguments that one thing is the 'functional equivalent' of the

other, for example, soon breaks down what might have been a bright line into a blurry impressionistic pattern.'" *Id.* at 333. (citing *Robbins v. California*, 453 U.S. 420 (1981) (Rehnquist, J., (now C.J.), dissenting)).

This Court has produced significant Fourth Amendment precedent, both in the automobile context and in the reasonable suspicion context, to provide guidance to both the police and the courts. Moreover, the appellate process "tends to unify precedent and will come closer to providing law enforcement officers with a defined 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" *Ornelas v. United States*, 116 S. Ct. 1657, 1662 (1996). Accordingly, this Court should reject the State's proposed bright-line rule.

E. Because Trooper Hughes was not constitutionally entitled to automatically require Wilson to exit the vehicle, the evidence seized was a fruit of the poisonous tree. Accordingly, the trial court correctly ruled that the evidence must be suppressed, and the appellate court correctly affirmed the judgment of the trial court.

When Trooper Hughes ordered Wilson out of the vehicle, he did so without reasonable suspicion, as required under *Terry* and its progeny. Therefore, the evidence obtained, pursuant to an illegal seizure, should be suppressed, as a fruit of the poisonous tree.

CONCLUSION

For the foregoing reasons, Respondent Jerry Lee Wilson respectfully urges this Court to affirm the judgment of the Court of Special Appeals of Maryland.

Respectfully submitted,

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